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CITATIONS

716896—46

In the Supreme Court of the United States

October Term, 1946

No. 523

Estate of Harold I. Pratt, Deceased, United States Trust Company of New York and Harriet Barnes Pratt, Executors, petitioners

v.

Commissioner of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The prevailing (R. 71–86) and dissenting (R. 86–88) opinions in the Tax Court are reported in 5 T. C. 881. The opinion of the circuit court of appeals (R. 101–102) is reported in 156 F. 2d 235.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 27, 1946 (R. 103–104). The petition for a writ of certiorari was filed

on September 20, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1903, the decedent established a trust, reserving the income for life and also the right to get back the corpus if he should survive two individuals. He survived one of them and died in 1939. The Commissioner included the trust corpus in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code, which applies to a transfer intended to take effect in possession or enjoyment at or after the grantor's death. In upholding the Commissioner, the Tax Court and the circuit court of appeals both held that there was no constitutional objection to the tax, even though the trust was created before the enactment of the estate tax law. Is such holding correct?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra,* pp. 8–14.

STATEMENT

The Tax Court found the following facts (R. 71, 73–74):

The decedent, Harold I. Pratt, was born on February 1, 1877. He died testate on May 21, 1939. (R. 71.)

By indenture of trust executed in the State of New York under date of January 15, 1903, the decedent transferred certain property in trust for the benefit of himself and remaindermen. Under the terms of this indenture, the trust term was measured by the lives of Morris Pratt and Mary Richardson Babbott (now known as and hereinafter referred to as Mary Richardson Babbott Ladd) and the survivor of them; and during the trust term the trust income, so far as here material, was to be paid as follows: To the decedent during his life; and upon the decedent's death, if issue of his survived him, to such of his issue as should from time to time be living, in equal shares, *per stirpes;* and, if the decedent left no issue surviving him, to such of his seven brothers and sisters as should from time to time be living and the issue of any of them that may have died leaving issue, in equal shares, *per stirpes.* The trust indenture further provided that, upon the termination of the trust term, the principal of the trust was to be transferred as follows: To the decedent if then living; and if the decedent should then be dead leaving issue then living, to such issue *per stirpes;* and if the decedent should then be dead leaving no issue, to his brothers and sisters him surviving and the issue of any of them as should then be dead, *per stirpes.* (R. 73–74.)

At the time of the decedent's death, Morris Pratt, who was born on November 29, 1885, was

deceased, but, at that time, and also on the applicable optional valuation date, Mary Richardson Babbott Ladd, who was born on April 27, 1887, was living, and the trust had not terminated. (R. 74.)

The Tax Court upheld the Commissioner's determination that the value of the trust assets was includible in the decedent's gross estate (R. 84). Six judges dissented (R. 88). The court below affirmed, *per curiam* (R. 102).

ARGUMENT

At the outset, it should be noted that the taxpayers make no contention that the instant transfer would not be taxable, and the entire trust corpus includible in the gross estate under Section 811 (c) of the Internal Revenue Code (Appendix, *infra,* p. 8, as a transfer intended to take effect in possession or enjoyment at or after death (*Helvering* v. *Hallock,* 309 U. S. 106; *Fidelity Co.* v. *Rothensies,* 324 U. S. 108; *Commissioner* v. *Estate of Field,* 324 U. S. 113), if the trust had been established after September 8, 1916, the date of the enactment of the federal estate tax statute. Moreover, it is not questioned that the law specifically provides, in Section 811 (h) (Appendix, *infra,* pp. 8–9), for inclusion of transfers of this character which were made prior to its adoption. And the regulations (T. R. 105, Section 81.17, Appendix, *infra,* p. 10) contain a similar provision. The sole contention made

in the courts below, and here, is that Section 811 (c) cannot constitutionally be applied in respect of a trust created prior to the adoption of the law.

In deciding this issue in the Commissioner's favor, the court below followed its own prior decision in *Commissioner* v. *Flanders*, 111 F. 2d 117, with respect to the constitutional point, although it pointed out that the rule there laid down for valuing the settlor's interest in the trust property was shown to have been too favorable to the taxpayer in *Commissioner* v. *Estate of Field, supra*. The court below also referred to *Matter of Pratt*, 262 App. Div. 240, affirmed, 289 N. Y. 621, in which the New York courts were called upon to decide the same question in reference to the New York estate tax. They upheld the tax and said that it could not be avoided on grounds of retroactivity.

We submit that the instant decision is clearly correct. The situation here differs from the one in *Nichols* v. *Coolidge*, 274 U. S. 531, upon which the taxpayers place their chief reliance (Pet. 4–10). In that case, the only significance of the settlor's death was to mark the date of the distribution of the property; consequently, the settlor's death did not take from her an interest in the corpus or augment the interests of the remaindermen. The transfer was completed prior to the adoption of the law and the decedent retained no possibility

of reversion, such as is here involved, which would hold in suspense and delay until her death or thereafter the ultimate possession or enjoyment of the trust property. Here there was such a retained interest, and in view of this, there is no constitutional obstacle to the tax.

This Court has upheld the estate tax in comparable situations in *United States* v. *Jacobs,* 306 U. S. 363, 366–371, relating to joint tenancies, and *Fernandez* v. *Wiener,* 326 U. S. 340, 355–359, relating to community property. The decisions in those cases make it plain that where, as in the instant case, the decedent's death results in an accession to the property rights of the donees, then the tax cannot be avoided on constitutional grounds even though the transfer was made prior to the passage of the law.

The taxpayers' suggestion (Pet. 7) that the decedent here, like the decedent in *Nichols* v. *Coolidge, supra,* could not reasonably have anticipated the tax when he made the transfer in 1903, should be considered in the light of the circumstances which show that the decedent lived for many years after the adoption of the law in 1916 and had ample opportunity, if he had wished to do so, to relinquish his reversionary interest and thus free his estate from liability. Cf. *Commissioner* v. *Chase Nat. Bank,* 82 F. 2d 157, 158 (C. C. A. 2d), certiorari denied, 299 U. S. 552; *Gwinn* v. *Commissioner,* 287 U. S. 224, 228–229.

The taxpayers say (Pet. 8–9) that there was also a possibility of reversion in *Nichols* v. *Coolidge,* so that it cannot be distinguished from the instant case. This contention is contrary to our understanding of the facts in *Nichols* v. *Coolidge.* As we read the case, the property was to pass inevitably to the children or their next of kin. See *Coolidge* v. *Nichols,* 4 F. 2d 112, 113 (D. Mass), affirmed, 274 U. S. 531. And if there was, in fact, a possibility that the grantor might reacquire the property by inheritance from the children if she outlived them it was not equivalent to a possibility of reversion, resulting from a gap in the disposition made by the grantor, and did not preclude the transfer from being absolute. See 4 F. 2d at 115.

CONCLUSION

The decision is correct, and there is no conflict. In the light of these considerations, there is no occasion for any further review in the instant case, and the petition should be denied.

Respectfully submitted.

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October 1946.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(h) *Prior Interests.*—Except as otherwise specifically provided therein, subsec-

tions (b), (c), (d), (e), (f), and (g) shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after February 26, 1926.

* * * * *

(26 U. S. C. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.17 [as amended by T. D. 5512, 1946–10 Int. Rev. Bull. 9]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred in-

terest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

Example (1). The decedent at 90 years of age transferred property in trust, providing for an estate for life in his granddaughter, 22 years of age, and a remainder to a child of the granddaughter. It was further provided that the estate in remainder would revest in the decedent if he survived the life tenant. Since the property may revert to the decedent and since the beneficiary taking the remainder must survive the decedent in order to obtain possession or enjoyment of the property, the value of the estate in remainder is includible in the decedent's gross estate. The value of the outstanding life estate is not so includible, since the life tenant need not survive the decedent in order to obtain possession or enjoyment thereof.

Example (2). The decedent, during his life, transferred property in trust, giving the income therefrom to his son for life and the remainder to his son's surviving issue. If no issue survived the life tenant, the property was to revert to the decedent or his estate. This transfer does not satisfy

requirement (1) specified above, since the life tenant's surviving issue need not survive the decedent in order to obtain possession or enjoyment of the property. Accordingly, no portion of the property is includible in the gross estate under this section.

Example (*3*). The decedent, during his life, transferred property in trust, giving the income to his wife for her life and the remainder to his father if living at the wife's death. If not, the property was to revert to the decedent if living, and if not, it was to pass to the decedent's issue and their heirs. If the father's death occurs first followed by the death of the decedent, it would appear at the moment immediately prior to the latter's death that possession or enjoyment of the remainder interest can be obtained only by beneficiaries who must survive the decedent. And since the property may revert to the decedent, requirements (1) and (2) are both satisfied, and the value of the estate in remainder is includible in the decedent's gross estate.

Example (*4*). The decedent, during his life, transferred property in trust, providing for payment of the income to his son until the latter reached the age of 25, at which time the son would receive the corpus. If the son died before reaching 25, the corpus was to revert to the decedent if living; and if not, it was to pass to his son's heirs. No portion of the property is includible in the decedent's gross estate. Although the property may revert to the decedent, his son can obtain possession or enjoyment of the remainder interest even though the decedent is living. Thus, the first requirement is not satisfied.

Example (*5*). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i. e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate.

Example (*6*). The decedent transferred property in trust, reserving a life estate and providing succeeding life estates in his wife and son. Upon the death of the son, the principal was to be paid to the son's wife; if the son's wife did not survive her husband, to the son's issue; and if there were no issue, to the decedent's next of kin. In this case, the decedent has parted with every right or interest in the property and hence requirement (2) is not satisfied. Accordingly, no part of the property is includible in the decedent's gross estate.

Example (*7*). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his

son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

Example (*8*). The decedent, during his life, transferred property in trust providing for payment of the income to his daughter during the life of the survivor of himself and his wife, and the remainder to his daughter or her issue. The wife was given the unrestricted power to alter, amend or revoke the trust. At the decedent's death, his wife is still living. Here, although it appears immediately prior to the decedent's death that the property may revert by operation of law to the decedent's estate in the event that the daughter and her issue should predecease the decedent and his wife, the first requirement is not satisfied, since the wife can obtain possession or enjoyment of the property during the decedent's lifetime through the exercise of her power to alter, amend or revoke. No part of the property is, therefore, includible in the decedent's gross estate. If the wife had predeceased the decedent, requirement (1) would be satisfied, since it would appear immediately prior to the decedent's death that neither his daughter nor her issue, the remaining beneficiaries, could obtain possession or enjoyment of the property unless they survived the decedent. Under these circum-

stances, the value of the remainder would be includible in the gross estate.

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48)), and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S. 106)), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S. 231), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this section, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

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